Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-1687

In The

Supreme Court of the United States

October Term, 1985

THE HOME INSURANCE COMPANY,

Petitioner,

— against —

HOWARD TAYLOR,

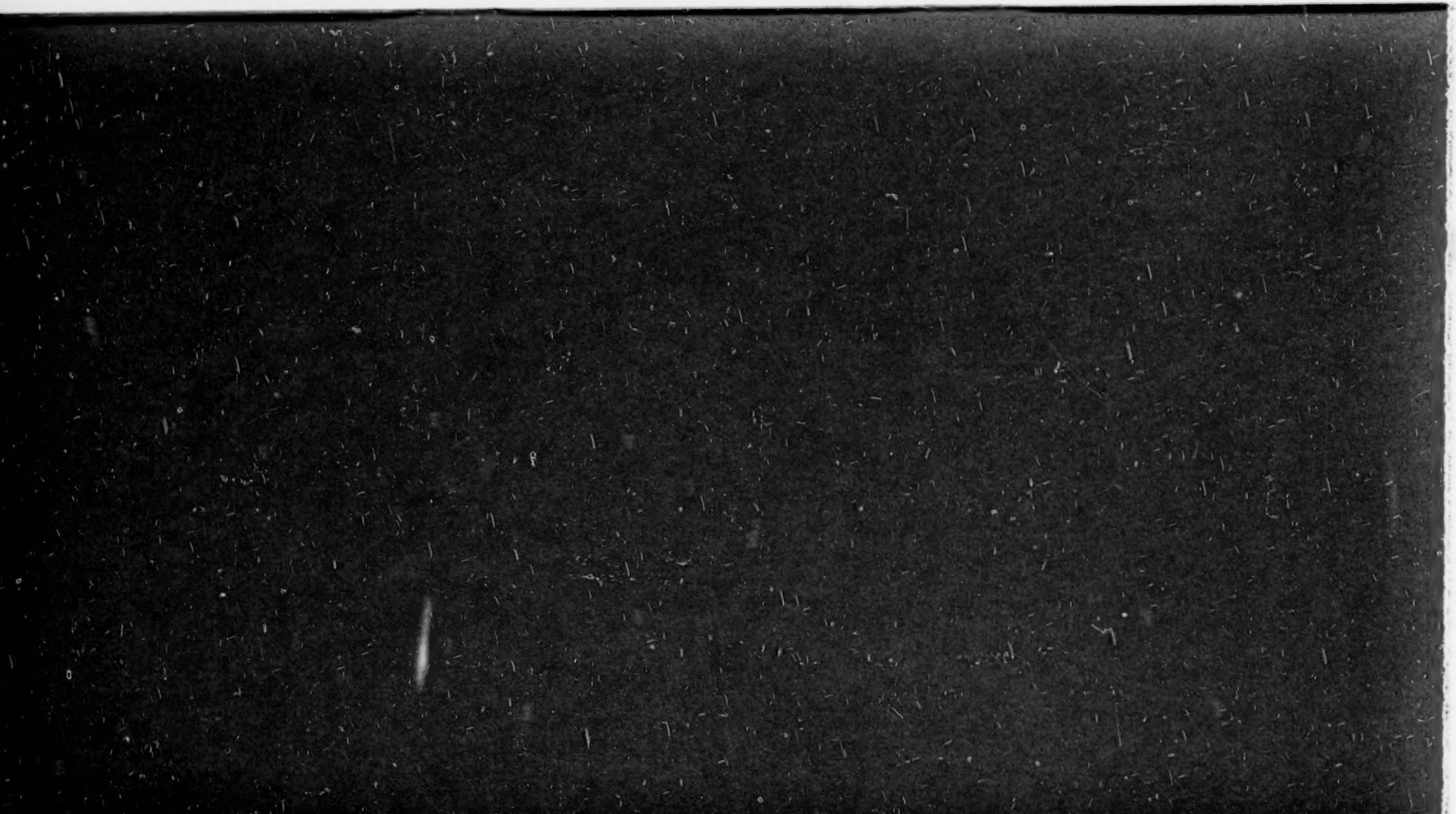
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondent



QUESTION PRESENTED

Does the "continuing violation" doctrine of Havens Realty Co. v. Coleman, 455 U. S. 363 (1982), allow recovery in an Age Act case for an otherwise time-barred demotion, when the jury finds that this demotion was done pursuant to a pattern and practice of discrimination against older employees, and another demotion pursuant to this policy and practice has occurred within the limitation period?

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--against--

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Respondent Howard Taylor respectfully prays that the Court decline to grant a Writ of Certiorari.

STATEMENT OF THE CASE

The pertinent facts are accurately summarized in the opinion of the Circuit Court. Pet. Cert., A. 4-8. The facts bearing particularly on the "pattern and practice" aspects of the case appear at Pet. Cert., A. 6-8.

SUMMARY OF ARGUMENT

Petitioner argues that the unlawful policy and practice of age discrimination was not established by the proof. This argument is meritless because Petitioner does not claim that the jury's finding of policy and practice was clearly erroneous.

Petitioner also argues that demotions are inherently incapable of being done pursuant to an unlawful policy or practice. This extreme proposition does not make sense.

ARGUMENT

In Havens Realty Corp. v. Coleman, 455 U.S. 363, (1982), this Court held that if a violation of the Fair Housing Act, 42 U.S.C. 3604, occurs within that Act's limitation period, then violations which occurred beyond the limitation period are actionable if they occurred pursuant to the same policy or practice as did the violation within the limitation period. 455

U.S. at 380-81. In the case at bar the Circuit Court, noting the similarity between the limitation provision of the Fair Housing Act, 42 U.S.C. 3612(a),[1] and that of the Age Act, 29 U.S.C. 626(d)(1),[2] applied Havens to the Age Act. Pet. Cert., A. 12-14. Petitioner does not challenge this holding. Rather, the substance of its argument is that the Circuit Court incorrectly applied Havens to the facts of the present case. See, e.g., Pet. Cert., 5. Petitioner makes two separate arguments to this end:

1. that no unlawful policy or practice was established by the proof; see, e.g., Pet. Cert., 5-6; and

2. that demotions are inherently

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[1] "A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred." 42 U.S.C. 3612(a).

[2] "[A] charge shall be filed within one hundred and eighty days after the alleged unlawful practice occurred." 29 U.S.C. 626(d)(1).

incapable of being done pursuant to an unlawful policy or practice; see, e.g., Pet. Cert., 8-10.

The first argument fails because the question of whether Defendant "conduct[ed] a continuing policy or practice of discrimination against older company employees" from the time of Respondents' first demotion (which was outside the limitation period) until his second demotion (which was within the limitation period) was put to the jury[3] and answered, "yes." Pet. Cert., A. 40, 41. Since Respondent does not claim that this finding of ultimate fact was clearly erroneous, the argument that the proof failed to show an unlawful policy of practice is meritless. Rule 52(a), Fed.R.Civ.P.; see, Anderson v. City of Bessemer City, ____ U.S. ___, 84 L.Ed.2d 518 (1985). Alternatively, there was ample

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[3] Petitioner does not assert that the instructions under which this issue was submitted to the jury were erroneous.

evidence of an unlawful policy or practice of age discrimination. Pet. Cert., A. 6-8.

Petitioner's second argument, that demotions are inherently discrete and isolated acts, is also not persuasive. The two demotions of Respondent were done by the same Regional Manager. This man made a hundred personnel changes in a period of two years and only once was a younger person replaced by an older person, and that was done to promote the younger person. Pet. Cert. A. 8, 4. The evidence shows that the demotions of Respondent were in fact not isolated and discrete acts, but part of a policy and practice of demoting older employees, which emanated from the President of the company and was carried out by the Regional Manager. Petitioner argues that a demotion is more akin to a lay-off or a discharge than to a promotion, and therefore is inherently not a continuing violation. Petitioner cites several

cases which it claims establish that, while failures to promote can be continuing violations, discharges and lay-offs cannot be continuing violations. Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924-25 (C.A. 6, 1982), cert. den. 459 U.S. 971 (1982) (promotions); Berry v. Bd. of Supervisors of LSU, 715 F.2d 971, 981 (C.A. 5, 1983) (discharge); Lawson v. Burlington Industries, Inc., 683 F.2d 862 (C.A. 4, 1982) (lay-off). Even if these cases did draw such a bright-line rule -- which they do not -- they could not be squared with Havens. If all the black people at a plant are laid off, despite seniority, and all the white people retained, on day 191, the blacks are rehired on day 181, the blacks are again laid off on day 171, and both lay-offs occurred because the boss thought blacks were inferior, Havens would allow a claim of continuing violations. There would be an unlawful policy or practice and

a violation within one hundred and eighty days. The form of the personnel action is not determinative of whether an unlawful policy or practice exists. Neither lay-offs nor demotions are inherently isolated and discrete acts.

CONCLUSION

Upon the reasoning and authority stated, Respondent respectfully requests that no Writ of Certiorari be issued.

Respectfully submitted, this the 30 day of April, 1986.

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By: George Daly
GEORGE DALY

CERTIFICATE OF SERVICE

George Daly certifies:

1. I am a member in good standing of the bar of this Court, having been admitted on October 12, 1971.

2. Today I personally caused to be deposited in a United States mailbox, first-class postage prepaid, the following numbers of copies addressed to the following opposing counsel:

Raymond L. Vandenberg - 3 copies
425 Park Avenue
New York, New York 10022

John Gibbons - 1 copy
101 Park Avenue
New York, New York 10178

George R. Hodges - 1 copy.
3300 NCNB Plaza
Charlotte, North Carolina 28280

3. All parties required to be served have been served.

This the 2 day of May, 1986.

George Daly
GEORGE DALY